Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Telecommunications, Inc.	)	
Request for Declaratory Ruling that State	)	
Commissions May Not Regulate Broadband	)	WC Docket No. 03-251
Internet Access Services by Requiring	)	
BellSouth to Provide Wholesale or Retail	)	
Broadband Services to CLEC UNE Voice	)	
Customers	)	

COMMENTS OF THE PROMOTING ACTIVE COMPETITION EVERYWHERE ("PACE") COALITION

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DATED: January 30, 2004

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The Promoting Active Competition Everywhere ("PACE") Coalition, through counsel, hereby files its Comments in opposition to BellSouth's unlawful and overbroad preemption request ("Petition") in response to the Public Notice released by the Federal Communications Commission (the "Commission") on December 16, 2003 and the subsequent Order of the Competition Policy Division.[1]

I. INTRODUCTION AND SUMMARY

The PACE Coalition is composed of competitive local exchange carriers ("CLECs") that provide a variety of telecommunications services to business and residential consumers throughout the country.[2] Each of the PACE Coalition companies offers a form of bundled local exchange and long distance services, among other services.

1 *See* Public Notice, DA 03-2679 (Dec.16, 2003) and Order, DA 03-4111 (Dec. 30, 2003).

2 PACE Coalition members include: ACCESS Integrated Networks, Inc.; Birch Telecom; BizOnline.com, Inc. d/b/a Veranet Solutions; BridgeCom; DataNet Systems; DSCI Corp.; Ernest Communications; IDS Telcom LLC; InfoHighway Communications; ITC^DeltaCom, Inc.; MCG Capital Corporation; MetTel; Microtech-Tel; Momentum Business Solutions Inc.; nii communications; Sage Telecom, Inc.; and Z-Tel Communications, Inc.

In providing their services to residential and small business customers, PACE Coalition carriers utilize in various degrees the combination of unbundled network elements ("UNEs") commonly referred to as UNE-P.

A. The BellSouth Petition Identifies No "Emergency"

Under the guise of an alleged but wholly unsupported "emergency," BellSouth requests that the Commission take affirmative regulatory action well beyond any of the Commission's existing rules (and statutory authority) to preempt state commission action regarding the provision of voice and data services to end users. BellSouth, however, provides no factual support whatsoever for the ostensible emergency resulting from the complained of state commission action and potential action.

In BellSouth's view, an emergency exists because six of the nine states that comprise BellSouth's service territory have addressed at least tangentially the issues raised in BellSouth's petition. BellSouth likes the state commission decisions in North Carolina and South Carolina, but is dissatisfied with the state commission decisions in Florida, Georgia, Louisiana, and Kentucky.[3] In the remaining three states that comprise BellSouth's territory – Alabama, Mississippi, and Tennessee – BellSouth is concerned that it might not be happy with the eventual state commission determinations in ongoing section 252 arbitration decisions.[4] Apparently, BellSouth fears that states outside of its territory could take similar action, and, even though BellSouth would not be affected by such speculative action, BellSouth believes the Commission should preempt possible state action nationally.

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[3] BellSouth Petition, 5-6.

[4] *Id.*, 9.

BellSouth claims without any specificity that it is being forced to undertake undefined "costly and burdensome efforts" to comply with the state commission decisions and that it is being "deprive[d] … of the benefit of [its] DSL investment" by selling DSL to consumers that buy voice service from UNE-P providers and others.[5] Since no empirical analysis, financial or otherwise, accompanies BellSouth's emergency petition, the exigency of the "emergency" is difficult to estimate.

The reason BellSouth provides no empirical data to elaborate upon its proclaimed "emergency" becomes clear with a simple review of BellSouth's publicly-released financial results. In 2003, despite its "costly and burdensome efforts" to comply with state regulation, BellSouth managed to generate $22.6 billion in revenue and $5.3 billion in free cash flow.[6] BellSouth's financial performance has been so strong that "[o]ver the last seven quarters, the company has increased its quarterly dividend 31.6 percent to 25 cents per common share."[7] Specific to its DSL services:

> BellSouth added 126,000 net DSL customers in the fourth quarter of 2003, compared to 97,000 customer additions in the fourth quarter of 2002, bringing its end of year total subscribers to 1.46 million. BellSouth's FastAccess® DSL Lite contributed to this increase. BellSouth's Internet access portfolio offers customers an easy migration path from dial-up Internet access to two different tiers of high-speed Internet access with the option to add features like home networking and parental controls. Led by DSL, data revenues of $1.1 billion grew 4.0 percent in the fourth quarter of 2003 compared to the same quarter of 2002.[8]

5 *Id.*, 3.

6 BellSouth Press Release, BellSouth Reports Fourth Quarter Earnings at 2 (Jan. 22, 2004) (attached hereto as Tab A).

7 *Id.*

8 *Id.*, 3.

Given BellSouth's obviously successful results overall and for FastAccess DSL (a primary subject of the Petition) in particular, the stated "emergency" appears unlikely to have emanated from any business unit.

Beyond the factual shortcomings underlying the proclaimed emergency, the Petition has fundamental procedural defects as well. Rather than identify and seek preemption of specific statutory provisions or state commission rules, as expressly required by section 253 of the Act,[9] BellSouth seeks general preemption of state commission authority improperly through declaratory ruling.[10]

B. The State Commission Decisions Are Reasonable And Supported By The Act

The state commission decisions at issue are fully consistent with the Act and this Commission's implementation of the Act. Indeed, the state commissions in Florida, Georgia, Kentucky, and Louisiana acted well within their authority under federal and state law in finding that BellSouth may not disconnect a customer's DSL service merely because the customer wants voice service from a provider other than BellSouth.

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9 47 U.S.C. § 253.

10 *See, id.* First, BellSouth requests that the Commission declare that "state commission decisions requiring [incumbent local exchange carriers ("ILECs")] to provide broadband Internet access to CLEC UNE voice customers are contrary to the Triennial Review Order and are thus preempted." Petition, 32. Second, BellSouth requests that the Commission declare that "state commission decisions requiring the provision of broadband Internet access to CLEC UNE voice customers impose regulation on interstate information services in contravention of this Commission's orders." *Id.* Third, BellSouth requests that the Commission declare that "state commission decisions specifying the terms and conditions under which ILECs provide federally tariffed broadband transmission, either on its own or as part of a broadband information service, intrude on this Commission's exclusive authority over interstate telecommunications and are thus preempted." *Id.*

Florida. In an arbitration proceeding between a CLEC, Florida Digital Network ("FDN"), and BellSouth, the Florida Public Service Commission ("FPSC") held that BellSouth may not disconnect existing DSL service provided over a UNE loop.[11] The FPSC found that this practice "raises a competitive barrier in the voice market" and "unreasonably discriminates among customers," in violation of Sections 202 and 251 of the Act, as well as section 364 of the Florida Statutes, Fla. Stat. § 364.[12] As the FPSC explained:

> It is incumbent upon us to promote competition. The evidence shows that BellSouth routinely disconnects its [DSL] service when a customer changes its voice provider to FDN, which reduces customers' options for local telecommunications service. The evidence also indicates that this practice is the result of a business decision made by BellSouth. Moreover, BellSouth has declined to eliminate this practice, contending that it would result in increased costs and decreased efficiency. The record does not, however, reflect that BellSouth cannot provision its [DSL] service over an FDN voice loop or that doing so would be unduly burdensome. *As such, we find that this practice unreasonably penalizes customers who desire to have access to voice service from FDN and DSL service from BellSouth.* ... Furthermore, because we find that this practice creates a barrier to competition in the local telecommunications market in that customers could be dissuaded by this practice from choosing FDN or another [CLEC] as their voice service provider, this practice is also in violation of [Florida Statutes promoting local competition].[13]

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11 *Petition by Florida Digital Network, Inc. for Arbitration*, Docket No. 010098-TP, Final Order, No. PSC-02-0765-FOF-TP (June 5, 2002), *recon. denied* Aug. 8, 2002.

12 *Id.* at 5. Section 364 requires the FPSC to remove barriers to competitive entry, to ensure nondiscriminatory service, and to promote competition. Fla. Stat. §§ 364.01(4)(b), (d) and (g). Apparently, BellSouth would have the Commission preempt this Florida statutory provision.

13 *Id.* at 6-7.

The FPSC reiterated this finding in a second arbitration proceeding raising the same issue.[14] Although BellSouth has interpreted these decisions to be limited to the CLECs that were parties to the arbitrations, the FPSC presently is considering a request to clarify that BellSouth must provision DSL service to all CLEC customers without limitation.[15]

Georgia. On October 21, 2003, the Georgia Public Service Commission ("GPSC") ordered BellSouth to provide its DSL service to voice customers of CLECs.[16] The issue arose when MCI filed a complaint with the GPSC arguing that BellSouth's refusal to provision its "FastAccess" DSL service to MCI local voice customers was anticompetitive, discriminatory, and illegal. According to trade reports, the GPSC agreed with MCI that BellSouth's refusal to provide its DSL service to CLEC voice customers "discriminates against MCI because it does not allow MCI to provide voice service to a customer that receives FastAccess DSL service from BellSouth; whereas BellSouth can provide voice service to this customer."[17] The GPSC also found that BellSouth's practice constitutes an "illegal tying arrangement" in violation of state law.[18]

Kentucky. The Kentucky Public Service Commission ("KPSC"), in the context of an interconnection arbitration in 2002, ordered BellSouth to provide the

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14 *Petition by BellSouth Telecommunications, Inc. for Arbitration of Certain Issues in Interconnection Agreement with Supra Telecommunications and Information Systems, Inc.,* Docket No. 001305-TP (June 11, 2002).

15 Case 020507-TL, Complaint of the Florida Competitive Carriers Association Against BellSouth Telecommunications, Inc. and Request for Expedited Relief (filed Jun. 12, 2002). A hearing on this complaint was held in July 2003.

16 *Complaint of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 11901-U (filed Apr. 29, 2002). The Georgia PSC announced its decision on October 21, 2003. As of the date of this filing, the decision has not been released.

17 See TR Daily, "BellSouth Ordered to Provide DSL to Georgia CLEC Customers" (Oct. 21, 2003).

18 *Id.*

customers of Cinergy, a CLEC, with BellSouth DSL service regardless of whether the customer is served via resale, UNE-P or UNEs.[19] The KPSC stated that BellSouth's practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a "chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers."[20] A recent federal district court decision uphold the KPSC's determination. [21]

Louisiana. The Louisiana Public Service Commission ("LPSC") held in the context of its Section 271 review that BellSouth must "provide its ADSL service to end users over the high frequency portion of the same loop being used by a CLEC to provide voice service."[22] The LPSC adopted this rule on its Staff's recommendation, which found it "disturbing" that "BellSouth will not provide a customer with its retail DSL service unless that customer also purchases its voice service from BellSouth as well."[23] The FCC did not disturb this rule – nor did BellSouth complain of this ruling – during the proceeding evaluating BellSouth-Louisiana's section 271 application, which this Commission approved.[24] Subsequently, the LPSC reiterated that BellSouth must

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19 *Petition of Cinergy Communs. Co. for Arbitration*, 2001 WL 34013323 (Ky. P.S.C. 2002).

20 *Id.* The Commission later clarified this holding to state that BellSouth may not disconnect existing BellSouth DSL service to a Cinergy UNE-P customer, but that BellSouth "shall have no obligation" to commence providing its DSL service to a Cinergy UNE-P customer. *Petition of Cinergy Communs. Co. for Arbitration*, 2003 WL 21019485 (Ky. P.S.C. 2003).

21 *BellSouth Telecomm's, Inc. v. Cinergy Comm's Co.*, 2003 WL 23139419 (E.D.Ky.) (Dec. 29, 2003) ("*Cinergy*") (attached hereto as Tab B).

22 Order No. U-22252(E) at 3 (La. P.S.C. Sept. 9, 2001).

23 Staff's Final Recommendation, Docket No. U-22252(E) at 86.

24 *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, CC Docket No. 02-35, 17 FCC 9018 238-244 (2002).-

provide its DSL service over CLEC UNE-P loops. The LPSC emphasized that its "policy is to support competition in all telecommunications markets, including local voice service. The anti-competitive [e]ffects of BellSouth's practice are at odds with the Commission's, and thus should be prohibited."[25]

There can be no doubt that the above-referenced state commission determinations are reasonable. None of these decisions has been reversed, and as noted, the KPSC's determinations were upheld in federal district court less than one month ago.[26] In Alabama, Mississippi, and Tennessee, BellSouth's only ripe complaint is that the state commissions have decided to review the issue in section 252 arbitration proceedings. In addition to being valid under *Cinergy*, with no decision on the merits there simply is nothing the Commission could preempt at present, even if such preemption were lawful, which it is not.

In any event and as described below, BellSouth's requests for relief are inappropriate on all counts. Foremost, as previewed above, blanket preemption of possible state determinations through declaratory ruling is inappropriate under the Act, which sets forth the process this Commission must follow in order to preempt a state commission rule or state statutory provision. Indeed, the Act codifies a form of "cooperative federalism" that balances the authority of this Commission with that of the state commissions.[27] BellSouth's reliance on the Triennial Review Order[28] similarly is

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25 *In re: BellSouth's Provision of ADSL Service to End Users over CLEC Loops Pursuant to the Commission's Directive in Order U-22252-E*, Order No. R-26173 (Jan. 24, 2003); *see also*, Clarification Order, Order No. R-26173-A (Apr. 4, 2003).

26 *See infra* n. 21.

27 *Puerto Rico Tel. Co. v. Telecom's Regulatory Bd. of P.R.*, 189 F.3d 1, 14 (1st Cir. 1999).

misplaced. Even assuming, *arguendo*, that declaratory rulings could be appropriate for reviewing state commission decisions that establish new UNEs, that is not at issue here. None of the decisions referenced by BellSouth established a new UNE or required BellSouth to provide a new UNE. Rather, the state commission decisions at issue have established "a relatively modest interconnection-related condition for a local exchange carrier so as to ameliorate a chilling effect on competition for local telecommunications regulated by the [state commissions]."[29] Nor do the state commission actions contradict any other Commission order. Accordingly, the state commissions have acted well within their authority under the Act and state law, and therefore, the Commission should reject BellSouth's Petition.

II. THE RELIEF REQUESTED BY BELLSOUTH IS INCONSISTENT WITH THE ACT

BellSouth's Petition fundamentally is flawed because it fails to follow the process set forth in section 253(d) of the Act. Instead of following the express path codified by Congress, BellSouth requests that this Commission preempt state action generally and preempt existing rulings of four state commissions and potential rulings of three other state commissions specifically. The Petition cites no statutory basis for the action it requests the Commission to undertake because none exists. Indeed, BellSouth's 32-page Petition devotes less than two pages to its view of the Commission's preemption

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28 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (rel. Aug. 21, 2003) ("TRO").

29 *Cinergy* at *6.

authority, and in so doing, BellSouth relies solely on section 1.2 of the Commission's rules regarding declaratory rulings, and four irrelevant orders of the Commission, all of which significantly pre-date Congress' 1996 overhaul of the Act.[30] The reason for this glaring omission is plain: section 253(d) codifies the Commission's path to preemption, and BellSouth knows that it cannot satisfy section 253(d)'s standards.

A. The Act Expressly Limits The Commission's Authority To Preempt The States

The foundation of the preemption doctrine is "the Supremacy Clause, U.S. Const., Art. VI, cl. 2, [which] invalidates State laws that 'interfere with, or are contrary to' federal law."[31] Preemption may be express or implied. Express preemption occurs to the extent that a federal statute expressly directs that state law be ousted completely or to some lesser degree from a field. Implied preemption occurs either when the *scope* of a statute indicates that Congress intended federal law to occupy the field exclusively (field preemption), or when state law is in actual conflict with federal law (implied conflict preemption).[32]

Of course, just as "preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law,"[33] Congress similarly can circumscribe the extent to which preemption is permissible under a federal statute.

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30 BellSouth Petition, 30-31.

31 *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 US 707, 712 (1985).

32 *Freightliner Corp. v. Myrick*, 514 US 280, 287 (1995). *See also Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977) (where compliance with state law does not trigger "federal enforcement," the state law is not inconsistent with federal law).

33 *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 376 (1986).

Congress did just that with the creation of section 253(d) of the Act. As this Commission itself has noted:

> Although Congress "legislated comprehensively," which otherwise would support the conclusion that it was "occupying the entire field of regulation and leaving no room for the States to supplement federal law," Congress has made clear that the States are not ousted from playing a role in the development of competitive communications markets.[34]

Congress went well out of its way to preserve state authority and to tailor narrowly this Commission's preemption authority under Title II of the Act by including section 253 in the 1996 amendments.

Indeed, as Justice Breyer has stated, with the 1996 addition of section 253, Congress "explicitly grant[ed] the FCC a particular preemption tool."[35] The Commission similarly has stated, "[t]he 1996 Act created [s]ection 253 of the Communications Act, which expressly empowers the Commission to preempt state and local laws under *certain specified conditions*."[36] Further elaborating on the importance of section 253, former Commissioner Furchtgott-Roth has stated:

> The 1996 Act contemplates that state commissions will play an important part in bringing competition to the local exchange markets, and it gives states freedom to fashion regulatory approaches that supplement the Act's federal requirements. This

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34 *The Public Utility Commission of Texas, et al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 3460, ¶ 52 (1997).

35 *AT&T v. Iowa Util's. Bd.*, 525 U.S. 366, 416 (1999) (Breyer, J., concurring in part and dissenting in part).

36 *Section 257 Report to Congress (Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses*, Report, 15 FCC Rcd 15376, ¶ 46 (2000) (emphasis added).

> Commission may interfere with a state commission's requirements *only* pursuant to section 253(d).[37]

Thus, Congress did not provide the Commission unrestrained authority to preempt state regulation by "occupying the field" or through any form of "implied" preemption.[38]

BellSouth's Petition fails even to acknowledge the existence of section 253(d), and instead BellSouth asserts that the Commission should "occupy the field" and preempt all existing – and potential – state decisions related to the interplay of local voice competition and broadband competition. As the FCC has explained, Congress did not intend federal telecommunications requirements "to disrupt the pro-competitive actions some States already have taken."[39] Indeed, "[t]he Act exemplifies a cooperative federalism system, in which State Commissions can exercise their expertise about the needs of the local market and local consumers, but are guided by the provisions of the Act and by the concomitant FCC regulations."[40]

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37 *Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part, Western Wireless Corporation (Petition for Preemption of Statutes and Rules and Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934*, Memorandum Opinion and Order, 15 FCC Rcd 16227, 16235 (2000) (citation omitted, emphasis added).

38 The Act contains other specific preemption provisions. For example, under section 276(c), to the extent that any State requirements regarding the provision of payphone service are inconsistent with the FCC's regulations, "the Commission's regulations on such matters shall preempt such State requirements." The Act, however, does not give the Commission general preemption authority. Rather, the Commission's preemption powers are carefully circumscribed by the Act.

39 *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*,First Report and Order, , 11 FCC Rcd 15499, ¶ 62 (1996) (subsequent history omitted) ("Local Competition Order").

40 *Puerto Rico Tel. Co. v. Telecomm's Regulatory Bd. of P.R.*, 189 F.3d 1, 14 (1st Cir. 1999). *See also*, *In re Verizon New England*, 2002 WL 253771 at 3 ("These various statutes preserving state authority are tied to specific aspects of the Act's requirements. Together, however, these statutes indicate that despite the detailed requirements the Act imposed on telecommunications operations, the regulatory scheme remains a partnership between federal and state authorities, in which

Elaborating on the balancing of interests resulting from the cooperative federalism set forth in the Act, the Supreme Court has stated:

> *Congress has broadly extended its law into the field of intrastate communications, but in a few specified areas ... has left the policy implications of that extension to be determined by the State commissions, which – within a broad range of lawful policymaking left open to administrative agencies – are beyond federal control.* Such a scheme is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to State agency interpretations of federal law, are novel as well.[41]

Far from supporting a position that this Commission may preempt state commissions at will by declaratory ruling, the Supreme Court's opinion *Iowa Util's. Bd.* confirms that the Act preserves state commission authority to promulgate regulations both under the Act and under state law.[42] In sum, the plain terms of the Act foreclose the very type of broad, unfettered preemption advocated by BellSouth.

As explained in more detail below, several sections of the Act expressly preserve the States' ability to enforce and impose State law requirements on telecommunications carriers so long as those requirements are not inconsistent with the Act's requirements.[43] Congress thus "explicitly disclaimed any intent categorically to pre-empt State law."[44] On the contrary, "[t]he narrow scope of pre-emption available under [the federal Act]

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states are granted broad power to regulate telecommunications as long as the states do not act inconsistently with federal law." *See also, Michigan Bell Telephone Company v. MCImetro Access Transmission Services, Inc.*, 323 F.3d 348, 352 (6th Cir. 2003) (noting that the additions of the local competition provisions to the Act in 1996 "has been called one of the most ambitious regulatory programs operating under 'cooperative federalism.'").

41 *AT&T v. Iowa Util's. Bd.*, 525 U.S. 385, n. 10 (emphasis added).

42 *Id.*

43 1996 Act § 601(c); *see also* 47 U.S.C. §§ 261(b), (c), 251(d)(3), 252(e)(3); *Bell Atlantic Maryland v. MCI WorldCom, Inc.*, 240 F. 3d. 279 (4th Cir. 2001).

44 *California Fed Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 281, 288 (1987).

reflects the importance Congress attached to State . . . laws in achieving [the Act's] goal . . . ."[45] BellSouth conveniently ignores the Act, and Congress' intention to maximize the ability of the states to implement the pro-competitive goals of the Act.

B. Section 253, Not A Generic Request For Declaratory Ruling, Is The Appropriate Vehicle For The Relief Requested By BellSouth, And BellSouth Cannot Satisfy Section 253

As noted above, Congress amended Title II by adding section 253 as a path to preemption to enable this Commission to ensure that no state or local authority could erect legal barriers to entry to telecommunications markets that would frustrate the 1996 Act's explicit goal of opening local markets to competition. More specifically, section 253(d) empowers the Commission to preempt the enforcement of state requirements restraining the provision of telecommunications services.

Commission preemption of the existing state commission decisions in Florida, Georgia, Kentucky, and Louisiana is entirely impermissible under the preemption standard established by the Commission in section 253. Indeed, the plain language of section 253 demonstrates that the type of state regulations that Congress intended to permit the Commission to preempt are, in fact, the reverse of the type of requirements complained of in BellSouth's Petition.

Section 253 allows for preemption of state regulations that amount to "barriers to entry" — *i.e.,* any state regulation that "may *prohibit* or have the effect of prohibiting the ability of any entity to provide *any* interstate or intrastate telecommunications services."[46] Consistent with the overriding pro-competitive goal of

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[45] *Id.* at 282-83.

[46] *Id.* § 253(a), (d) (emphasis added). "Section 253(b) exempts from pre-emption

the Act, Congress thus provided through section 253 for the elimination of all state actions that impede competitive entry, while in contrast preserving any state actions that would seek to promote such entry and are otherwise consistent with the requirements of the Act.[47] BellSouth makes no claim under this provision, because the existing state commission decisions at issue are fully consistent with the pro-competitive mandates of the Act.

As for the pending section 252 arbitration proceedings in Alabama, Mississippi, and Tennessee (and the other unspecified proceedings that could occur in other states), even consideration of preemption is inappropriate, as those state commissions have reached no decision as of yet. Speculative preemption of the sort requested by BellSouth in these three states is impermissible under section 253. Remarking on this fact, Former Commissioner Furchtgott-Roth noted that section 253 "states that if the Commission 'determines that a State or local government *has permitted or imposed* any statute, regulation, or legal requirement that violates [section 253(a) or (b)], the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.'"[48] Because the "provision is drafted in the present tense" the Commission may not "legally

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under § 253(a) state regulatory laws that are imposed "on a competitively neutral basis" and that are designed to, *inter alia,* "ensure the continued quality of telecommunications services" or "safeguard the rights of consumers." 47 U.S.C. § 253(b). By requiring SWBT to enable CLECs to provide consumers and businesses with additional phone lines or new lines, this Commission assuredly would be satisfying the policy goals of § 253.

47 *See, e.g.,* 47 U.S.C. §§ 251(d)(3), 252(e)(3), and 261(c).

48 *See supra* n. 37.

make section 251(d) determinations on state commission rulings that do not exist."[49] Moreover, in cases where "no regulation currently exists, a Commission ruling is most assuredly not 'necessary to correct' the [state commission's] approach to implementing the Act's … provisions."[50] Accordingly and at a minimum, BellSouth's preemption request for Alabama, Mississippi, Tennessee, and other undefined states is not ripe for review.

III. THE STATE COMMISSION DECISIONS FULLY COMPORT WITH THE ACT AND THE COMMISSION'S ORDERS

Congress intended for active participation by the states in the ongoing effort to implement the Act in general, and section 251 more specifically. Namely, the Act contemplates a distinct and ongoing role for the states in furthering the development of competition in telecommunications markets.[51] For this reason, Congress preserved state authority to impose additional regulations under several sections of the Act, including sections 251(d)(3), 252(e), and 261(c).[52] Section 251(d)(3) specifically preserves the ability for state action under both the Act and state law. Sections 252(e)(3) and 261(c) preserve the states' general authority to establish and enforce regulations that are consistent with the pro-competitive provisions of the 1996 Act, including the unbundling provisions. In and of themselves, these provisions provide sufficient authority for states to establish regulations to promote competition within their jurisdictions.

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49 *Id.*

50 *Id.*.

51 Local Competition Order, 11 FCC Rcd. at 15505, ¶ 2.

52 47 U.S.C. §§ 251(d)(3), 252(e), and 261(c).

A. The State Commission Decisions Are Consistent With Section 251 Of The Act

Section 251(d)(3) permits the states to establish regulations that do not conflict with the requirements of section 251, and expressly precludes this Commission from impeding state regulations:

> *In prescribing and enforcing regulations to implement requirements of this section*, the Commission *shall not* preclude the enforcement of any regulation, order, or policy of a State commission that-
> (A) establishes *access* and interconnection obligations of local exchange carriers;
> (B) is consistent with the requirements of this section and
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.[53]

This section makes clear that the states' ability to establish regulations, including those that are the subject of BellSouth's Petition, is expressly preserved by Congress, and is not a grant of delegated authority that the Commission can regulate away through a declaratory ruling by taking action outside of its narrowly-tailored preemption authority contained in section 253(d).

Significantly, the states, under section 251(d)(3), are not bound by the specific limits placed on the Commission when adopting regulations pursuant to section 251(d)(2). Section 251(d)(3) by its express terms does not require all state access and interconnection regulations to be coextensive with the Commission's regulations promulgated under section 251.[54] To be clear, the PACE Coalition is not suggesting that

53 *Id.*, § 251(d)(3) (emphasis added).

54 *See Iowa Util's. Bd. v. FCC*, 120 F.3d 753, 807 ("subsection 251(d)(3) would prevent the FCC from preempting [a] state rule [that met the standards of Sections 251(d)(3)(B) and (C)] even though it differed from an FCC regulation.").

states may impose *any* regulation. Rather, under subsection 251(d)(3)(B), any state prescribed obligations must be consistent with the requirements of section 251. Subsection 251(d)(3)(C) prevents the states from adopting regulations that would "substantially prevent" the opening of the ILECs' networks to competitive carriers under the Commission's orders.[55] However, there simply can be no doubt that the existing and potential state commission rulings complained of by BellSouth do nothing to "substantially prevent implementation of the requirements" of section 251. Rather, the existing state commission rulings further the goals of section 251 by maximizing both consumer choice among telephony providers and broadband deployment, thereby bringing competitive alternatives to as many consumers as possible.

Section 251(d)(3) reveals explicit Congressional intent to preserve state authority to adopt pro-competitive regulations, even where the Commission has not. In fact, the Eighth Circuit Court of Appeals held that section 251(d)(3) "constrains the FCC's authority" to preempt State access and interconnection obligations.[56]

If the Commission were to accept BellSouth's arguments that the Commission "occupies the field" under section 251(d)(2), the state authority preserved to "establish access obligations" under section 251(d)(3) would be rendered a nullity. With section 251(d)(3), Congress intended to preserve the states' traditional authority to regulate local telephone markets and to shield state access and interconnection orders

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55 In addition, state regulations would also be constrained by Section 253(a), among other statutory and constitutional requirements.

56 *Iowa Util's. Bd. v. FCC*, 120 F.3d at 806 (8th Cir. 1997), not at issue in *AT&T v. Iowa Util's. Bd.,* 525 U.S. 366 (1999). The Eighth Circuit strongly suggested that a general FCC rule would be inappropriate to preempt any specific state regulations adopted under Section 251(d)(3). *Id.* at 806-07 & nn. 27-28.

from FCC preemption, so long as the state rules are consistent with the requirements of section 251 and do not substantially prevent the implementation of section 251. Applied to the case at hand, there is no question that BellSouth has complied and is able to comply with *both* Commission requirements *and* the state requirements that are the subject of BellSouth's Petition. Indeed, BellSouth never claims that it has not or cannot comply with the variation in regulation at issue in this proceeding across its footprint.

BellSouth's issue is not that it cannot comply with state regulation. Rather BellSouth does not want to comply with certain of the state commissions' rulings, and BellSouth further does not want to have regulation that varies by state. A lack of desire to comply with a regulation, however, does not form a basis for preemption under the Act. Indeed, the plain terms of section 251(d)(3) do not preclude the establishment of state-specific obligations. To the contrary, that section expressly provides for state-specific obligations. As long as state access requirements are not in material conflict with the ILECs' obligations under the federal rules, such that compliance with both sets of requirements is impossible, the state obligations should be deemed to meet the section 251(d)(3)(B) requirement of consistency.[57]

B. The State Commission Decisions Are Supported by Section 252(e)(3) Of The Act

Section 252(e)(3) provides that: "Notwithstanding paragraph [252 (e)(2)], but subject to Section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality

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57 *Id.*

standards or requirements." Accordingly, this provision without question gives the state commissions authority to make determinations under both federal and state law when reviewing an interconnection agreement.

Any doubts regarding state commission authority to resolve in section 252 arbitration proceedings the issues raised in BellSouth's Petition were put to rest by the *Cinergy* court reviewing the KPSC decision at issue here. As noted in *Cinergy,* "the [KPSC] determined that it would consider 'whether BellSouth acts reasonably in refusing to provide DSL service to competitive UNE-P providers under, inter alia, 47 U.S.C. § 252(e) … and KRS § 278.280.'"[58] After developing a full record in its arbitration proceeding, the KPSC rejected BellSouth's disconnection practice because it created a "chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers."[59] The *Cinergy* court held that neither the Act nor any decision of this Commission – including the TRO – preempted the KPSC's ability to address this issue under section 252,[60] and moreover that the KPSC's determination was reasonable.[61] In upholding the KPSC, the court concluded that "the [KPSC's] order does not substantially prevent implementation of federal statutory requirements and thus, it is the Court's determination that there is no federal preemption."[62]

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58 *Cinergy* at * 7 (citing to the KPSC's July 12, 2002 Order at 7) (internal quotations omitted).

59 *Id.*

60 *Id.*, *5.

61 *Id.*, *7.

62 *Id.*, *6.

The *Cinergy* decision is dispositive of BellSouth's effort to have this Commission preempt by declaratory ruling the states generally the Alabama, Mississippi, and Tennessee commissions' consideration of BellSouth's DSL disconnection practices in ongoing section 252 proceedings.[63] State commission action in this regard has not been preempted, either by the Act or by this Commission. To the extent the Commission wishes to preempt at some future date state commission action taken under section 252, the appropriate statutory vehicle is section 253, not a generic declaratory ruling. By the plain terms of this section, the Commission can only preempt state action under section 252(e)(3) by acting under section 253. As explained above, BellSouth has neither invoked section 253, nor could it come close to satisfying section 253 with the facts presented in its Petition.

C. The State Commission Decisions Are Supported by Section 261 Of The Act

In addition to sections 251(d)(3) and 252(e)(3), section 261(c) of the Act preserves the states' authority to impose additional pro-competitive rules over and above those set forth in the Act or the FCC's rules. Section 261(c) provides as follows:

> Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone *exchange service or exchange access*, as long as the State's requirements are not inconsistent with this part or the [FCC's] regulations to implement this part.[64]

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[63] For these same reasons, the Commission cannot issue a blanket preemption decision foreclosing the ability of other state commissions from reviewing practices similar to those of BellSouth maintained by other carriers in other jurisdictions.

[64] 47 U.S.C. § 261(c) (emphasis added).

Although BellSouth concedes that its DSL service is in fact "exchange access" and the state commissions' rulings further competition for intrastate telephony service, BellSouth makes no effort to explain whether it believes its request is consistent with section 261.

BellSouth's Petition would have the Commission attempt to make a nullity of section 261 in any instance where the Commission establishes a national rule, without any analysis of the consistency of a state rule and whether it actually conflicts with the Commission's rules. Rather than attempt the impossible task of reconciling this provision with its self-styled "emergency" petition for declaratory ruling, BellSouth omits any discussion of 261(c).

D. The State Commission Decisions Are Fully Consistent With The Triennial Review Order

BellSouth incorrectly asserts that the state commission decisions at issue are preempted under the TRO.[65] In so doing, BellSouth premises its reliance on the TRO on this Commission's decision to reject CompTel's request to establish a new UNE for the "low frequency portion of the loop."[66] Although, rightfully or wrongfully, the Commission rejected CompTel's request, the related passages in the TRO are completely irrelevant to the state commission decisions at hand, as none of those state commissions established the "low frequency portion of the loop" as a UNE. Thus, none of the state commission unbundling decisions at issue in the BellSouth Petition conflict with the FCC's unbundling finding regarding the low frequency portion of the loop.

Even assuming the validity of the Commission's other statements regarding its preemption authority – which the PACE Coalition by no means concedes –

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65 BellSouth Petition, 3-4, 10-14.

66 *Id.*, 12 (citing TRO at ¶ 270).

BellSouth's arguments fail. Implicitly recognizing that none of the state commission orders that BellSouth finds offensive require unbundling of a new UNE, BellSouth moves to its hackneyed advocacy regarding alleged investment disincentives.[67] BellSouth's lament in this regard, however, is unsupported by the TRO and unsupportable in reality.

Nothing in the TRO, or the Act for that matter, provides for preemption based on BellSouth's conception of its incentives. Moreover, even if BellSouth had a legal leg to stand on, BellSouth has presented no facts to suggest its incentives are in fact different based on the various state commission rulings. Indeed, the effect of the state commission rulings on BellSouth would provide fruitful data regarding whether and to what extent BellSouth's investment incentives have been chilled. If BellSouth were correct, presumably its DSL deployment in North Carolina and South Carolina – states that permit BellSouth to tie voice and data services – would far outstrip deployment in Florida, Georgia, Kentucky, and Louisiana, which preclude BellSouth's preferred disconnection policy. BellSouth has presented no such data, and its alleged "disincentive" argument is thus supported only by the naked assertions of its lawyers.

For all of these reasons, the TRO provides no comfort to BellSouth. Moreover, any reasonable reading of the TRO and the Act demonstrates without question that the Commission may not grant the relief requested by BellSouth.

* * *

In sum, the state commission orders complained of by BellSouth fully comport with state authority under the Act, and speculation regarding what other state commissions might do is an inadequate basis for preemption under the Act. Any

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67 *See*, *id.*, 15-16.

Commission effort to preempt the authority of states to promulgate regulations addressing the interplay between the provision of telephony service and DSL service on the grounds that this Commission "occupies the field" also would conflict with the Act. The FCC may not through declaratory ruling ignore section 253 or overrule sections 251(d)(3), 252(e)(3), or 261. Rather, in light of the preemption parameters established and the state authority preserved by Congress, this Commission is obligated to consider the preemption of state regulations, *if at all*, on a case-by-case basis in adjudicatory settings, pursuant to section 253 and subject to the limitations in sections 251(d)(3)(B) and (C). BellSouth's Petition utterly fails to address, let alone satisfy, the statutory scheme set forth in the Act because it knows it cannot meet those high standards. Moreover, no amount of BellSouth bootstrapping can demonstrate that the state commission actions conflict with the TRO. Accordingly, the Commission should reject BellSouth's request for declaratory ruling.

IV. THE STATE COMMISSION DECISIONS FURTHER THE GOALS OF THE ACT

At bottom, BellSouth's Petition seeks Commission preemption of state commission rulings that preclude an unlawful tie between BellSouth's DSL offering and its telephony offering. As more fully described below, BellSouth bundles its voice service to its DSL service so consumers are only able to purchase BellSouth's DSL service if the customer also purchases BellSouth's voice service over the same loop. In states where it is lawful, BellSouth disconnects DSL service to any customer that selects a competitive local exchange carrier to provide its local voice service. BellSouth's practice of bundling its voice and DSL services effectively prevents consumers from obtaining the voice provider of their own choosing.

BellSouth's practice is not due to any technical impediment or any limitations on its ability to provision DSL service to the customer, but instead is done solely to safeguard its dominant market share in local voice services. BellSouth knows that its disconnect practice will make it more difficult for customers to switch carriers, thereby impeding the pace at which consumers will leave BellSouth for competitive local voice service providers.

From a practical standpoint, but for state commission action, BellSouth would preclude consumers that subscribe to BellSouth's DSL services from switching to another provider for local voice service. This is wholly contrary to true competitive choice, which enables consumers to pick whatever service they desire from whichever service provider they select. Indeed, BellSouth's goal in this proceeding is to secure a ruling from the Commission that affirmatively authorizes BellSouth's preferred practice impeding the ability of consumers to select a local service provider of choice by refusing to fulfill carrier change requests unless the customer also disconnects DSL service from BellSouth. Notwithstanding the myriad statutory violations that would result from any grant of BellSouth's Petition, the relief requested also would make bad policy.

PACE Coalition member companies frequently are unable to provision local service to a customer because the customer also has DSL service from BellSouth. To migrate a customer from BellSouth to a CLEC, a local service request ("LSR") must be submitted to BellSouth, which in turn BellSouth is required to process and provision electronically. When a CLEC submits an LSR for a BellSouth voice customer who receives BellSouth DSL service, BellSouth can – and does, where required – migrate the customer to the CLEC for voice service. However, where such migration is not required by the state commission, those LSRs are rejected as "ineligible" for conversion, and BellSouth instructs the CLEC to inform the customer that he or she must first disconnect DSL service in order to switch local service providers.

BellSouth knows that, from the customer's perspective, disconnection of DSL service is very disruptive and often expensive. Specifically, the customer generally must select a new provider and notify family, friends, and others of new email addresses. Customers also often have to pay installation and equipment charges to a new provider and may have termination liability to BellSouth under an existing service plan. Not surprisingly, many customers are unwilling to suffer these consequences and choose instead not to change local carriers.

The PACE Coalition is not suggesting that BellSouth be precluded from offering bundled service packages to BellSouth's own customers, so long as they lawful under relevant law. Rather, the Coalition maintains that the Commission should recognize BellSouth's preferred practice of disconnecting DSL service when a customer selects a competitive voice service provider for what it is: an unlawful, anti-competitive, and discriminatory practice that is contrary to the Act's goal of promoting a fully open, competitive market for telecommunications services.

The power of DSL service as a means of preserving an incumbent's market dominance in local telecommunications is further evidenced by the fact that five state commissions already have prohibited the incumbent LEC from disconnecting a CLEC customer's DSL service when that customer chooses a different provider for voice service.

BellSouth's preferred policy of disconnecting DSL service when a customer receives local service from a CLEC discriminates among similarly situated customers. BellSouth's seeks to treat customers of CLECs differently than BellSouth's retail customers, regardless of whether there are any technical differences between the customers. In many cases (*e.g.,* when the customer is served via UNE-P), the customers are served using the exact same facilities, both when Verizon provides local service and when a CLEC is the local service provider. This is conclusive evidence that the customers are in fact similarly situated.

In addition, BellSouth admits that it makes an exception to its desired refusal to provide DSL service to non-BellSouth customers if the customer is served by a CLEC using resale pursuant to Section 251(c)(4) of the Act.[68] As a result, CLECs who pay the higher resale rates to BellSouth do not experience the anti-competitive effects of BellSouth's practice, while CLECs that serve local customers via other entry strategies authorized under federal law are subjected to this barrier.

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68 BellSouth Petition at n. 16.

V. CONCLUSION

Consistent with the foregoing, the Commission should reject BellSouth's Petition.

Respectfully submitted,

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Counsel to the PACE Coalition

DATED: January 30, 2004

TAB A

BELLSOUTH

back

Newsroom

MEDIA CONTACTS MAY BE OUT OF DATE -- FOR CURRENT INFORMATION CLICK HERE (http://bellsouthcorp.com/newsroom/contacts.vtml)

BellSouth Reports Fourth Quarter Earnings

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- 4 million long distance customers
- 1.5 million high-speed Internet customers
- 642,000 Cingular Wireless net additional customers
- 345,000 Latin America net additional customers

For Immediate Release

January 22, 2004

ATLANTA - BellSouth Corporation (NYSE: BLS) reported earnings per share (EPS) of 43 cents in the fourth quarter of 2003, including special charges totaling 8 cents (see below). This compared to reported EPS of 31 cents in the fourth quarter of 2002, which included special charges totaling 14 cents (see below).

For the fourth quarter, consolidated revenues increased 0.9 percent to $5.7 billion compared to the same quarter of the previous year. Net income was $787 million compared to $574 million in the same quarter a year ago.

In accordance with Generally Accepted Accounting Principles (GAAP), BellSouth's reported consolidated revenues and consolidated operating expenses do not include the company's 40 percent share of Cingular Wireless. Normalized results include BellSouth's 40 percent proportionate share of Cingular's revenues and expenses.

Normalized EPS of 51 cents increased 13.3 percent in the fourth quarter of 2003 compared to 45 cents in the same quarter a year ago. Normalized revenues were $7.3 billion, an increase of 4.1 percent versus the fourth quarter of 2002. Normalized net income was $949 million, compared to $846 million in the same quarter a year ago.

Full Year Results

For the full year of 2003, BellSouth reported EPS of $2.11. This compared to 71 cents in 2002, which included special charges totaling $1.32 outlined in the attached financial statements. For the full year, consolidated revenues increased 0.9 percent to $22.6 billion. Reported net income was $3.9 billion compared to $1.3 billion the previous year. Normalized EPS was $2.07 compared to $2.03 in 2002. Including Cingular, revenues were up slightly versus 2002 at $28.7 billion. Normalized net income was $3.8 billion for the year, up slightly compared to 2002.

Operating free cash flow (defined as cash flow from operations less capital expenditures) totaled $5.3 billion for the full year. Capital expenditures for 2003 were $3.2 billion, a reduction of 15.5 percent compared to 2002. Total debt at December 31, 2003 was $15.0 billion, a reduction of $2.4 billion since the first of the year.

In November, BellSouth's Board of Directors declared an 8.7 percent increase in the quarterly common stock dividend, payable February 2, 2004. Over the last seven quarters, the company has increased its quarterly dividend 31.6 percent to 25 cents per common share.

Communications Group

In 2003, BellSouth Long Distance and DSL high-speed Internet service revenue growth offset access line declines holding Communications Group revenues nearly flat at $18.4 billion compared to 2002. In the fourth quarter, revenues increased 2.1 percent to $4.6 billion compared to $4.5 billion in the same quarter the previous year. Operating margin for the quarter improved to 25.7 percent compared to 24.6 percent in the same quarter last year.

In the fourth quarter, BellSouth AnswersSM packages increased to more than 3 million, which represents a 24 percent penetration of primary access lines. Answers combines customers' local, long distance, Internet and wireless services all on one bill. BellSouthÒ Unlimited AnswersSM contributed to the growth in package customers with subscribers exceeding 1 million at the end of fourth quarter. Unlimited Answers allows customers to call anywhere in the United States anytime for a flat monthly fee.

BellSouth added approximately 3 million long distance customers during 2003, for a total of 3.96 million customers and almost 30 percent penetration of its mass-market customers by year-end. During the fourth quarter, about 40 percent of new customers included international long distance in their calling plans. This was due in part to the October introduction of BellSouth's International Advantage Plan, which offers residential customers competitive flat rates at any time of day to many countries including Canada and Mexico.

BellSouth added 126,000 net DSL customers in the fourth quarter of 2003, compared to 97,000 customer additions in the fourth quarter of 2002, bringing its end of year total subscribers to 1.46 million. BellSouthÒ FastAccess® DSL Lite contributed to this increase. BellSouth's Internet access portfolio offers customers an easy migration path from dial-up Internet access to two different tiers of high-speed Internet access with the option to add features like home networking and parental controls. Lead by DSL, data revenues of $1.1 billion grew 4.0 percent in the fourth quarter of 2003 compared to the same quarter of 2002.

Total access lines of 23.7 million at December 31 declined 3.6 percent compared to a year earlier, impacted by the economy, competition and technology substitution. Residence and business access lines served by BellSouth competitors under UNE-P (unbundled network elements-platform) increased by 199,000 in the fourth quarter.

Domestic Wireless / Cingular

Cingular Wireless added 642,000 net cellular/PCS customers in the fourth quarter. Cingular's focus on calling plans tailored to local markets and co-branding and bundling programs with its parent companies were significant contributors to growth at Cingular, which ended the quarter with more than 24 million cellular/PCS customers.

As disclosed in Cingular's press release, the company changed its presentation of Universal Service Fund (USF) payments and receipts to a gross basis. Reflecting this change, BellSouth's share of Cingular's revenues was $1.6 billion, a gain of 5.7 percent compared to the same quarter a year ago. Segment operating income was $131 million for the quarter compared to $284 million in 2002. Fourth quarter operating margins were impacted by significantly higher gross customer additions, extensive customer retention programs, increased advertising and costs associated with launching wireless local number portability. For the full year of 2003, segment operating income totaled $915 million compared to $1.1 billion in 2002.

Cingular continues to upgrade network efficiency and capability through movement of its subscriber base to GSM/GPRS and deployment of EDGE. By the end of 2003, the company's GSM/GPRS network was available to 93 percent of its potential customers and with approximately 57 percent of subscriber minutes traveling on this upgraded network.

Latin America Group

Growth in customers, revenues and margins continued in the Latin America wireless group during the fourth quarter of 2003. Wireless customers increased 345,000 on a consolidated basis. Year-over-year, customers increased 1.5 million, or 18.6 percent. BellSouth's Latin America group served 9.7 million customers at year-end.

Consolidated Latin America revenues increased 30.9 percent to $636 million in the fourth quarter of 2003 compared to the same three months of the previous year. Strong customer growth in Venezuela, Argentina, Chile and Colombia drove the increase in segment revenues. Focusing on growing revenues, improving operating margins and targeting capital deployments contributed to positive operating free cash flow in 2003. Segment net income was $62 million in the fourth quarter and $161 million for the full year.

During the fourth quarter, BellSouth entered into a debt purchase agreement with senior secured creditors of BCP, a wireless company in Sao Paulo, Brazil. As a result of the agreement, BellSouth sold its entire interest in BCP and recognized a total net loss associated with the sale of $161 million.

Advertising & Publishing

Advertising & Publishing revenues were $522 million in the fourth quarter of 2003, a decrease of 6.1 percent compared to the same quarter a year ago, resulting in part from reduced spending on advertising and continued competition. Segment net income of $147 million was 24.6 percent higher than the fourth quarter of 2002, primarily as the result of improvement in uncollectibles expense. Full year operating revenues declined 5.0 percent and net income improved 10.1 percent.

Special Items

In the fourth quarter of 2003, the difference between reported (GAAP) EPS of 43 cents and normalized EPS of 51 cents is the result of three special items:

Foreign currency transaction gains	1 cent	Gain
Pension settlement / severance costs	1 cent	Charge
Sale of Brazil SP	9 cents	Charge
Effect of Rounding	1 cent	
Total of special items	8 cents	Charge

Foreign currency transaction gains - Primarily associated with the remeasurement of U.S. dollar-denominated liabilities in Latin America.

Pension settlement / severance costs - This charge represents the net severance related costs recorded in the fourth quarter associated with workforce reductions, offset by pension settlement gains associated with workforce reductions.

Sale of Brazil SP - Loss on sale of Brazil SP.

In the fourth quarter of 2002, special charges totaled 14 cents per share, after rounding, for: asset impairments (11 cents); workforce reduction (3 cents); disposition of Listel (3 cents);

foreign currency transaction losses (1 cent) and an adjustment of 4 cents to Advertising & Publishing results to reflect the 2003 accounting change.

About BellSouth Corporation
BellSouth Corporation is a Fortune 100 communications services company headquartered in Atlanta, Georgia. BellSouth and its affiliates serve more than 45 million local, long distance, Internet and wireless customers in the United States and 13 other countries.

Consistently recognized for customer satisfaction, BellSouth provides complete communications solutions to the residential and business markets. In the residential market, BellSouth offers DSL high-speed Internet access and long distance, advanced voice features and other services. The company's BellSouth AnswersSM package combines local and long distance service with an array of calling features; wireless data, voice and e-mail services; and high-speed DSL or dial-up Internet service and Cingular Wireless. In the business market, BellSouth serves small, medium and large businesses providing secure, reliable local and long distance voice and data networking solutions. BellSouth also provides online and directory advertising services through BellSouth® RealPages.comSM and The Real Yellow Pages®.

BellSouth owns 40 percent of Cingular Wireless, the nation's second largest wireless company, which provides innovative wireless voice and data services.

Further information about BellSouth's fourth quarter earnings can be accessed at http://www.bellsouth.com/investor. The press release, financial statements and BLS Investor News summarizing highlights of the quarter are available on the BellSouth Investor Relations web site starting today at 8 a.m. Eastern Time.

BellSouth will host a conference call with investors today at 10 a.m. Eastern Time (ET). Participating will be BellSouth CFO, Ron Dykes and Investor Relations Vice President, Nancy Davis. Dial-in information for the conference call is:
Domestic: 888-370-1863
International: 706-634-1735

A replay of the call will be available beginning at approximately 1 p.m. (ET) today, through January 29, 2004. The replay can be accessed by dialing:
Domestic: 800-642-1687 - Reservation number: 4367951
International: 706-645-9291 - Reservation number: 4367951

The conference call will also be web cast live beginning at 10:00 a.m. (ET) on our website at http://www.bellsouth.com/investor. A replay of the call will be available on the website through January 29, 2004.

In addition to historical information, this document may contain forward-looking statements regarding events and

financial trends. Factors that could affect future results and could cause actual results to differ materially from those expressed or implied in the forward-looking statements include: (i) a change in economic conditions in domestic or international markets where we operate or have material investments which would affect demand for our services; (ii) currency devaluations and continued economic weakness in certain international markets in which we operate or have material investments; (iii) the intensity of competitive activity and its resulting impact on pricing strategies and new product offerings; (iv) higher than anticipated cash requirements for investments, new business initiatives and acquisitions; (v) unfavorable regulatory actions and (vi) those factors contained in the Company's periodic reports filed with the SEC. The forward-looking information in this document is given as of this date only, and, BellSouth assumes no duty to update this information.

This document may also contain certain non-GAAP financial measures. The most directly comparable GAAP financial measures, and a full reconciliation of non-GAAP to GAAP financial information, are attached hereto and provided on the Company's investor relations web site, http://www.bellsouth.com/investor**.**

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A list of BellSouth Media Relations Contacts **is available in the** Corporate Information Center**.**

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BellSouth Corporation Headquarters
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Atlanta, GA 30309-3610

TAB B

Only the Westlaw citation is currently available.

United States District Court,
E.D. Kentucky.

BELLSOUTH TELECOMMUNICATIONS, INC., Plaintiff,
v.
CINERGY COMMUNICATIONS COMPANY, et al., Defendants.

No. CIV.A.03-23-JMH.

Dec. 29, 2003.

Background: Incumbent local exchange carrier (ILEC) sought review of the Kentucky Public Service Commission requiring it to continue to provide digital subscriber line (DSL) service over competitive local exchange carrier (CLEC) unbundled network elements platform (UNE-P) lines.

Holdings: The District Court, Hood, J., held that:
(1) order was not preempted by federal law, and
(2) order was not arbitrary and capricious.
Affirmed.

[1] Telecommunications ⚷263

372k263 Most Cited Cases

Federal judiciary reviews de novo whether a state public service commission's orders comply with the requirements of the Telecommunications Act. Communications Act of 1934, § 251 et seq., as amended, 47 U.S.C.A. § 251 et seq.

[2] Telecommunications ⚷267
372k267 Most Cited Cases

Kentucky Public Service Commission had discretion to review issue as to whether incumbent local exchange carrier (ILEC) could be required to provide digital subscriber line (DSL) service on an unbundled network elements platform (UNE-P) line; DSL issue was "directly related" to the line-splitting issue that competitive local exchange carrier (CLEC) raised in its original petition, and both parties addressed that issue at later points in the proceeding. Communications Act of 1934, § 252(b)(4)(a), as amended, 47 U.S.C.A. § 252(b)(4)(a).

[3] States ⚷18.81
360k18.81 Most Cited Cases

Kentucky Public Service Commission order requiring incumbent local exchange carrier (ILEC) to continue to provide digital subscriber line (DSL) service over competitive local exchange carrier (CLEC) unbundled network elements platform (UNE-P) lines was not preempted by federal law; Telecommunications Act made room for state regulations, orders and requirements of state commissions as long as they did not substantially prevent implementation of federal statutory requirements. Communications Act of 1934, §§ 251(d)(3)(C), 252(e), as amended, 47 U.S.C.A. §§ 251(d)(3)(C), 252(e); K.R.S. 278.280.

[3] Telecommunications ⚷267
372k267 Most Cited Cases

Kentucky Public Service Commission order requiring incumbent local exchange carrier (ILEC) to continue to provide digital subscriber line (DSL) service over competitive local exchange carrier (CLEC) unbundled network elements platform (UNE-P) lines was not preempted by federal law; Telecommunications Act made room for state regulations, orders and requirements of state commissions as long as they did not substantially prevent implementation of federal statutory requirements. Communications Act of 1934, §§ 251(d)(3)(C), 252(e), as amended, 47 U.S.C.A. §§ 251(d)(3)(C), 252(e); K.R.S. 278.280.

[4] States ⚷18.3
360k18.3 Most Cited Cases

State laws can be expressly or impliedly preempted by federal law.

[5] States ⚷18.5
360k18.5 Most Cited Cases

Federal law may preempt state law when federal statutory provisions or objectives would be frustrated by the application of state law.

[6] States ⇐18.7
360k18.7 Most Cited Cases

Where Congress intends for federal law to govern an entire field, federal law preempts all state law in that field.

[7] Telecommunications ⇐267
372k267 Most Cited Cases

Kentucky Public Service Commission order requiring incumbent local exchange carrier (ILEC) to continue to provide digital subscriber line (DSL) service over competitive local exchange carrier (CLEC) unbundled network elements platform (UNE-P) lines was not arbitrary and capricious; decision was supported by a reasoned explanation and was based upon the evidence in the record as a whole. Communications Act of 1934, § 252(e), as amended, 47 U.S.C.A. § 252(e); KRS § 278.280.
Dorothy J. Chambers, Louisville, KY, Mark R. Overstreet, Stites & Harbison, Frankfort, KY, Sean A. Lev, Kellogg, Huber, Hanse, Todd & Evans, P.L.L.C., Washington, DC, for Plaintiff.

C. Hatfield, Middleton & Reutlinger, Louisville, KY, Robert Bye, Overland Park, KS, Amy E. Dougherty, Deborah Tully Eversole, Public Service Commission of Kentucky, Frankfort, KY, for Defendants.

MEMORANDUM OPINION AND ORDER

HOOD, District J.

*1 In this action, BellSouth Telecommunications, Inc. ("BellSouth") seeks review of a Kentucky Public Service Commission ("PSC" or "Commission") decision. The decision at issue was the result of an arbitration conducted by the Commission pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, 47 U.S.C. §§ 251-252 (the "1996 Act"). The crux of the decision to which BellSouth objects states that:

> BellSouth may not refuse to provide Digital Subscriber Line ("DSL") service pursuant to a request from an Internet service provider who serves, or who wishes to serve, a customer who has chosen to receive voice service from a Competitive Local Exchange Carrier ("CLEC") that provides service over the Unbundled Network Elements Platform ("UNE-P").

*Petition of **Cinergy Communications Company** for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252;* Case 2001-00432, October 15, 2002 Order. BellSouth asserts that the Commission's decision purports to regulate interstate telecommunications services in a manner that is directly contrary to binding Federal Communications Commission ("FCC") rulings and to BellSouth's federal tariff. BellSouth also claims that the Commission should never have decided the issue presented in this case because it was not set forth in Cinergy's arbitration petition as required by the 1996 Act. Additionally, BellSouth argues that the PSC's decision was arbitrary and unsupported by the record.

I. BACKGROUND

A. Procedural Background

Cinergy is a privately-owned, Kentucky corporation which has been operating in Kentucky as a telecommunications provider since 1977. To facilitate its service to Kentucky residents, Cinergy entered into an initial interconnection agreement with BellSouth which expired on November 29, 2001. On May 30, 2001, Cinergy commenced negotiations with BellSouth for a new interconnection agreement pursuant to Section 251 of the 1996 Act. Despite a number of negotiation sessions over the next several months, the parties were unable to reach agreement on a number of issues. As a result, on December 10, 2001, Cinergy filed a Petition for Arbitration pursuant to Section 252 of the 1996 Act, requesting the PSC resolve sixteen disputed issues.

BellSouth filed its formal Response to the Petition on January 3, 2002, admitting the Commission had jurisdiction over the issues raised by Cinergy. The Commission set a procedural schedule for resolution of the case. Pursuant to the schedule, the parties filed agreed-upon portions of the interconnection agreement, as well as "Best and Final Offers" on the disputed issues. On January 31, 2002, the Commission Staff sponsored an informal conference at which the remaining issues were discussed and debated, including the precise issue BellSouth claims was not properly part of the proceeding. Limited discovery occurred, followed by the filing of direct, and some rebuttal testimony by the parties.

*2 As a result of continued settlement negotiations, only four issues were ultimately submitted to, and decided by, the Commission. The Commission heard the case in a formal hearing on May 22, 2002, which lasted a full day. The parties filed post-hearing briefs, proposed findings of fact and conclusions of law, and an additional brief on a specific issue requested by the Commission. The Commission issued its decision on July 12, 2002. [FN1]

Both parties sought clarification or rehearing of the Commission's Order. On October 15, 2002, the Commission clarified its Order, and issued a further Order on February 28, 2003, necessitated by the parties' inability to agree on the language for the interconnection agreement which would effectuate the Commission's decisions. On March 20, 2003, the parties submitted the interconnection agreement to the Commission, containing language specified by the Commission, on the disputed provisions. The Commission approved the interconnection agreement on April 21, 2003.

BellSouth commenced the present appeal by filing its complaint on May 9, 2003. Timely answers and briefs were filed. BellSouth challenges only the Commission's decision that BellSouth may not refuse to provide DSL capabilities to customers for whom a CLEC, such as Cinergy, is the voice provider through means of the UNE-P.

B. The Telecommunications Act of 1996

The 1996 Act places certain obligations on incumbent local exchange carriers ("ILECs") such as BellSouth--the companies that have traditionally offered local telephone service in particular areas. These obligations are intended to assist new local telecommunications providers such as Cinergy, AT & T, and MCI; these new local competitors are often referred to as competitive local exchange carriers or "CLECs."

ILECs like BellSouth must, among other things, lease to their competitors "for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis." See 47 U.S.C. § 251(c)(3). [FN2] In addition to requiring access to UNEs, the 1996 Act requires ILECs such as BellSouth to offer their complete, finished retail telecommunications services provided to end users, to new entrants for resale. See 47 U.S.C. § 251(c)(4).

The 1996 Act contains a specific scheme for implementing the new obligations imposed by the federal statute. This scheme contains three parts. *First,* Congress intended the mandates of Section 251 to be implemented in the first instance through the negotiation of private, consensual agreements between ILECs and CLECs. Thus, Section 251 imposes on both ILECs and CLECs "[t]he duty to negotiate in good faith in accordance with Section 252 of this title the particular terms and conditions of agreements to fulfill" the specific duties imposed on incumbents by Section 251. *Second,* as a backstop to reliance on privately negotiated agreements, Congress enlisted the aid of state public utility commissions like the PSC. If the parties are unable to agree on all issues within 135 days after the competitor's initial request for negotiation, either party may petition the state commission to arbitrate any "open issues." 47 U.S.C. § 252(b)(1). Regardless of whether the parties reach agreement through voluntary negotiation, mediation, or arbitration, the private parties must submit their agreement to the relevant state commission for approval. *See id.* § 252(e)(1). *Third,* and lastly, state commission decisions under this statute are subject to review in federal district courts for conformity with the terms of the Act. *See id.* § 252(e)(6).

C. Factual Background

*3 Until recently, customers wishing to access the Internet relied chiefly upon "dial-up" services that relied on the voice channel of a basic telephone line to transmit and receive data at relatively low speeds. Over the last several years, however, BellSouth and other companies have invested billions of dollars to make "broadband" internet access available--that is, to provide access at much higher speeds. [FN3]

There are several competing technologies that provide such high-speed broadband transmission for Internet access. For instance, one of the leading technologies is cable modem service offered over cable television facilities-- not telephone linesby companies such as AOL Time Warner. BellSouth offers a competing high-speed transmission service that does use telephone lines. This service is known as DSL. DSL makes use of the portion of the spectrum on a basic copper telephone line (also known as a "local loop") that is not used for voice services. DSL thus enables customers to download information from the Internet at high speeds without interfering with the normal operation of the voice channel on the telephone line.

By itself, DSL service is simply a high-speed data transmission (or transport) service. One can conceptualize DSL as the offering of a particularly large pipe for the transmission of data. In order to provide broadband Internet access on a retail basis, one must combine that DSL transmission service (the pipe) with the information routing and processing capabilities (the water running through the pipe) offered by an Internet Service Provider or "ISP" such as America Online or Earthlink.

BellSouth combines those two functions in its retail high-speed Internet access service, known as FastAccess. In addition to that retail service, BellSouth offers wholesale DSL transmission to independent ISPs so those companies can combine DSL transmission with their own capabilities in order to provide finished broadband Internet access to retail customers. The PSC's decision in this case relates only to BellSouth's wholesale offering of DSL transmission.

The PSC ruled that BellSouth may not refuse to provide DSL service pursuant to a request from an Internet service provider who serves, or wishes to serve, a customer who has chosen to receive voice service from a CLEC that provides service over the UNE-P. In other words, the PSC determined that BellSouth may not refuse to provide DSL to Cinergy, AT & T, and MCI customers; a Kentucky customer must be able to obtain DSL service regardless of the voice carrier he chooses.

II. STANDARD OF REVIEW

Along with the majority of other circuits, the Sixth Circuit has adopted and utilized a two-tiered review procedure when reviewing a ruling of a state administrative body. This bifurcated standard is employed because arriving at a decision in these types of disputes involves an understanding of the interplay between federal and state law.

[1] The federal judiciary first reviews *de novo* whether a state public service commission's orders comply with the requirements of the Telecommunications Act. The Court also reviews the Commission's interpretation of the Act de novo, according little deference to the Commission's interpretation. *Michigan Bell Tel. Co. v. Strand* 305 F.3d 580, 586 (6th Cir.2002). If no illegality is uncovered during such a review, the question of whether the state commission's decision is correct must then be analyzed, but under the more deferential arbitrary-and-capricious standard of review usually accorded state administrative bodies' assessments of state law principles. *See Michigan Bell Tel. Co. v. MFS Intelenet of Michigan, Inc.,* 339 F.3d 428, 433 (6th Cir.2003); *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas,* 208 F.3d 475, 482 (5th Cir.2000); *GTE South, Inc. v. Morrison,* 199 F.3d 733, 745 (4th Cir.1999); *U.S. West Communications v. MFS Intelenet, Inc.,* 193 F.3d 1112, 1117 (9th Cir.1999).

*4 The arbitrary and capricious standard is the most deferential standard of judicial review of agency action, upholding those outcomes supported by a reasoned explanation, based upon the evidence in the record as a whole. *See Killian v. Helthsource Provident Adm'rs, Inc.,* 152 F.3d 514, 520 (6th Cir.1998). The Court will uphold decision "if it is the result of a deliberate principled reasoning process, and if it is supported by substantial evidence." *Id.* Thus, absent clear error in interpretation of federal law or unsupported, arbitrary and capricious findings by a state commission, the decisions of state commissions generally stand. *Michigan Bell Tel. Co. v. MCIMetro Access Trans. Svcs. Inc.,* 323 F.3d 348, 353 (6th Cir.2003) (citing *Michigan Bell Tel. Co.,* 305 F.3d at 586-87.

III. ANALYSIS

A. Whether the PSC violated Section 252(b) of the Act

[2] Section 252(b)(4)(a) of the 1996 Act states that a "State commission shall limit its consideration of any petition ...to the issues set forth in the petition and in the response, if any." 47 U.S.C. § 252(b)(4)(a). Cinergy filed a petition with the PSC that set forth fifteen unresolved issues arising out of interconnection negotiations with BellSouth. As

stated above, due to continued negotiations, only four of these issues were ultimately addressed by the Commission.

BellSouth contends that one of the issues ultimately decided by the Commission, BellSouth's alleged obligation to continue to provide DSL service over CLEC UNE-P lines, was not raised in Cinergy's petition for arbitration. BellSouth relies on the plain language of Section 252(b)(4)(A) and states that it is improper for state commissions to resolve issues not presented in a petition for arbitration under the 1996 Act. Issues related to issues actually raised in a petition are, in BellSouth's opinion, not to be arbitrated by the PSC because of lack of notice to the parties. In any event, BellSouth contends, the issue ultimately decided by the PSC is in no way related to the issue set forth in Cinergy's original petition. Therefore, BellSouth argues that the PSC's ruling requiring BellSouth to provide DSL service on a UNE-P line was inappropriate and in violation of Section 252(b).

Cinergy takes the position that the Act does not require precise pleadings and, once an issue is open, the PSC has the discretion to review related issues. Relying on *TCG Milwaukee, Inc. v. Public Service Com'n of Wisconsin,* 980 F.Supp. 992 (W.D.Wis.1997), Cinergy states that once the parties create an open issue, the PSC has considerable latitude to resolve the related issues necessary to finalize the interconnection agreement and make it a working document. Cinergy also contends that BellSouth had sufficient notice that this was an issue before the Commission. The issue of DSL over UNE-P was debated by the parties at the informal conference, again at the hearing, and once again in the briefs, all without objection from BellSouth.

***5** The PSC determined in its October 15, 2003, Order that the DSL issue was "directly related" to the line-splitting issue that Cinergy raised as Issue No. 7 in its original petition, and that both parties had addressed this issue at later points in the proceeding. [FN4] Therefore, the PSC determined that the issue of DSL over the UNE-P was properly before the Commission. We agree and find no violation of Section 252(b).

B. Whether the PSC's Order is Preempted

[3] BellSouth argues that PSC's Order must fail because of federal preemption, stating that, "as a matter of federal law, the Federal Communications Commission ("FCC")--not state commissions--has exclusive jurisdiction over interstate communications." Cinergy counters that this is an oversimplification that results in a flawed characterization of the current law.

BellSouth maintains that DSL service, as used to provide Internet access, is an interstate service subject to the FCC's jurisdiction. Cinergy, on the other hand, states that since 1996, responsibility for increasing competition in the realm of telecommunications services, including those with an interstate dimension, has become the responsibility of both federal and state legislatures. Cinergy points to the concept of "cooperative federalism," and states that the Sixth Circuit has described this concept as "harmoniz[ing]" the efforts of federal and state agencies. *Michigan Bell Telephone Company v. MCIMetro Access Transmission Services, Inc.,* 323 F.3d 348, 352 (6th Cir.2003).

The Supreme Court has recognized that the Act cannot divide the world of domestic telephone service "neatly into two hemispheres," one consisting of interstate service, over which the FCC has plenary authority, and the other consisting of intrastate service, over which the states retain exclusive jurisdiction. *Louisiana Pub. Serc. Comm'n v. FCC,* 476 U.S. 355, 360, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986); *see also Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas,* 208 F.3d 475, 480 (5th Cir.2000). Rather, observed the Court, "the realities of technology and economics belie such a clean parceling of responsibility." *Id.* The FCC has also rejected the argument advanced by BellSouth, noting that "state commission authority over interconnection agreements pursuant to Section 252 extends to both interstate and intrastate matters." Reciprocal Compensation Ruling ¶ 25, quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order,* 11 F.C.C.R. 15499 ¶ 84, 1996 WL 452885 (1996).

In its Order, the PSC concluded that it did in fact have jurisdiction over this issue and that the FCC determinations were not preemptive:

We also have jurisdiction over the issue of whether BellSouth acts reasonably in refusing to provide DSL service to CLEC UNE-P customers under, inter alia, 47 U.S.C. § 252(e) and K.R.S. 278.280. The FCC's determination on this issue is not, and does not purport to be, preemptive.

*6 July 12, Order at 2.

[4][5][6] State laws can be expressly or impliedly preempted by federal law. *Michigan Bell Tel. Co.,* 323 F.3d at 358. Federal law may preempt state law when federal statutory provisions or objectives would be frustrated by the application of state law. *Id.* Moreover, where Congress intends for federal law to govern an entire field, federal law preempts all state law in that field. *Id.* The Sixth Circuit has held that when a state law is not expressly preempted, courts must begin with the presumption that the law is valid. *Springston v. Consolidated Rail Corp.,* 130 F.3d 241, 244 (6th Cir.1997). " 'It will not be presumed that a federal statute was intended to supersede the exercise of power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly presumed." ' *Id.* (quoting *New York State Dep't of Soc. Servs. v. Dublino,* 413 U.S. 405, 415, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973).

When Congress enacted the Telecommunications Act of 1996, it did not expressly preempt state regulation of interconnection. *Michigan Bell,* 323 F.3d at 358. In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition. *Id.* Specifically, Section 251(d)(3) of the Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act. 47 U.S.C. § 251(d)(3).

The Act permits a great deal of state commission involvement in the new regime it sets up for the operation of local telecommunications markets, "as long as state commission regulations are consistent with the Act." *Michigan Bell Tel. Co.,* 323 F.3d at 359 (citing *Verizon North, Inc., v. Strand,* 309 F.3d 935 (6th Cir.2002)). "Congress has made clear that the States are not ousted from playing a role in the development of competitive telecommunications markets...however, Congress did not intend to permit state regulations that conflicted with the 1996 Act...Thus, a state may not impose any requirement that is contrary to terms of sections 251 though 261 or that "stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *Michigan Bell Tel. Co.,* 323 F.3d at 359 (quoting *In re Public Utility Commission of Texas,* 13 F.C.C.R. 3460, ¶ 52 (Oct. 1, 1997) (internal citations omitted). According to the FCC, as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted. *Id.* (citing *In re Public Utility Commission of Texas,* 13 F.C.C.R. 3460, ¶ 50-52). The Court finds that nothing in the state regulations stand as an obstacle to the accomplishment and execution of the full objectives of Congress.

The 1996 Act incorporated the concept of "cooperative federalism," whereby federal and state agencies "harmonize" their efforts and federal courts oversee this "partnership." *Michigan Bell,* 323 F.3d at 352. Quite clearly, the 1996 Act makes room for state regulations, orders and requirements of state commissions as long as they do not "substantially prevent" implementation of federal statutory requirements. The PSC's order, challenged here by BellSouth, embodies just such a requirement. 47 U.S.C. § 251(d)(3)(C). It establishes a relatively modest interconnection-related condition for a local exchange carrier so as to ameliorate a chilling effect on competition for local telecommunications regulated by the Commission. The PSC order does not substantially prevent implementation of federal statutory requirements and thus, it is the Court's determination that there is no federal preemption.

C. Whether the PSC's decision is arbitrary and capricious.

*7 [7] Aside from BellSouth's other arguments, the company alleges that the PSC's decision is arbitrary and capricious in that it is unsupported by substantial evidence in the record as a whole. BellSouth contends that the Commission lacked any support for its conclusion that BellSouth's policy of refusing to provide DSL service on CLEC UNE-P lines has a "chilling effect on competition."

The Kentucky PSC determined that it would consider "whether BellSouth acts reasonably in refusing to provide DSL service to competitive carrier UNE-P customers under, inter alia, 47 U.S.C. § 252(e) [which preserves state law] and KRS § 278.280." July, 12, 2002 Order at 2. Kentucky law provides:

> Whenever the commission...finds that the rules, regulations, practices, equipment, appliances, facilities or service of any utility subject to its jurisdiction...are unjust [or] unreasonable,...the commission shall determine the just [or] reasonable...practices,...service or methods to be observed,... and shall fix the same by its order, rule or regulation.

KRS § 278.280(1). The PSC determined that BellSouth violated the above statute because its "practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers." July 12, 2002 Order at 7.

By claiming that the PSC's findings lack any support in the record, BellSouth vastly understates the administrative record. Cinergy offered voluminous testimony describing BellSouth's anti-competitive practices and explaining how they would cripple Cinergy's ability to compete in the local voice market. For instance, prior to this arbitration, the PSC entered an advisory opinion stemming from a separate investigation of BellSouth's policies and found such policies to have a chilling effect on competition:

> BellSouth is aggressively offering customers bundled voice and advanced services while, according to AT & T, BellSouth consistently precludes CLECs who use the unbundled network element platform (UNE-P) from offering customers this same option. This has the effect of chilling local competition for advanced services.

Kentucky 271 Advisory Opinion, pp. 13-14. Cinergy also presented multiple witness to testify regarding BellSouth's policy's effect on competition.

The PSC's decision is supported by a reasoned explanation and is based upon the evidence in the record as a whole. Consequently, the Court sees nothing that points to the PSC's decision being arbitrary or capricious. Therefore, because the PSC's decision seems to be the result of a deliberate principled reasoning process, and is supported by substantial evidence, the Court finds that the decision of the state commission should stand.

Accordingly,

IT IS ORDERED, that the PSC's decision be, and the same hereby is, AFFIRMED.

FN1. PSC Chairman Huelsmann dissented on the issue of BellSouth's refusal to provide Broadband services to a customer of a CLEC who is providing voice services via UNE-P citing regulatory uncertainty, inconsistency with FCC rulings, and lack of harm to Cinergy as the main reasons for his dissent.

FN2. These "network elements" are piece parts of the local telecommunications network.

FN3. In an earlier case in front of the PSC, *Review of BellSouth Telecommunications, Inc.'s Price Regulation Plan,* KPSC Case 99-434. Order, Aug. 3, 2000, the Commission conducted a review of BellSouth's rates, earnings, and method of regulation. Finding that the Company had excess earnings, BellSouth faced the prospect that the Commission would require it to substantially reduce the rates of its retail ratepayers by millions of dollars. BellSouth proposed to keep the excess earnings in order to build a broadband network into rural markets in Kentucky where standard business case analysis would not support such an investment. BellSouth stated that it would "make these same capabilities available to its competitors on a wholesale basis and therefore, would not have any competitive advantage." *Cinergy Hearing Exhibit 1 (Cinergy App. 3).* The Commission accepted BellSouth's proposal.

FN4. The Commission also stated that determinations such as the one at issue reflect the policy of the PSC. The Commission cited Administrative Case No.

382, An Inquiry Into the Development of Deaveraged Rates for Unbundled Network Elements, Order dated December 18, 2001 at 36 which states, "The Commission also makes clear in this Order that ordinarily combined UNEs must also be made available where line- splitting occurs. Line-splitting must be made available to all CLECs on a nondiscriminatory basis. Moreover, BellSouth may not discontinue the provision of line-splitting when a CLEC provides voice service through UNE- P, regardless of which xDSL provider is used." BellSouth did not contest this Commission ruling.

2003 WL 23139419, 2003 WL 23139419 (E.D.Ky.)

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